Yakin Tenggara Sdn Bhd v RHB Bank Bhd & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)-1995–12 OF 2015, B-02(IM)-1996–12 OF 2015 AND B-02(IM)-832–05 OF 2016

ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND PRASAD ABRAHAM JJCA

3 JANUARY 2017

Contract — Agreement — Sale and purchase — Failure to obtain approval of estate land board to transfer land — Vendor of land wound up by court order — Liquidators sought compromise order for SPA to be valid — Whether there was infringement of s 214A(1) of the National Land Code ('the Land Code') — Whether compromise order sought to validate unlawful act of disposal — Whether compromise to do unlawful act or to validate unlawful act null and void — Whether compromise order void for illegality — Conditional contracts — Whether conditional contracts exempted from operation of s 214A(1) of the Land Code — Whether compromise order to sell estate land without first obtaining approval of land board void — Whether decision to effect transfer of land to despite pendency of appeals was abuse of process and interference with administration of justice — Whether compromise order should be reversed and position of parties reinstated to their positions prior to grant of order

Faithmont Estate Sdn Bhd ('Faithmont') had entered into a sale and purchase agreement ('SPA') with Gula Perak Bhd ('GPB') to purchase GPB's oil palm estate land ('the land') for a consideration of RM19m. Faithmont had also paid GPB RM5.7m towards the purchase price. At the time of the sale the land was subject to a restriction that it could not be transferred without the consent of the state authority and the approval of the estate land board ('the land board') and was charged to AmBank (M) Bhd. Faithmont filed a suit against GPB for its failure to comply with the terms of the SPA in not taking steps to obtain the consent of the state authority and the approval of the land board. Faithmont also filed a second suit against AmBank as chargee of the land for, inter alia, the removal of a private caveat lodged by the bank on the land. By way of a court order these two suits filed by Faithmont were consolidated and ordered to be heard together ('the consolidated suits'). On 1 March 2013 GPB was wound up pursuant to a court order and liquidators were appointed under the winding up order. On 19 June 2015, the liquidators of GPB filed a notice of motion under s 236(1) of the Companies Act 1965 ('the Act'), seeking the court's approval to compromise the consolidated suits to enable GPB to enter into a consent judgment with Faithmont and AmBank. By way of the proposed scheme of arrangement the liquidators of GBP sought, inter alia, an order that

the SPA was a valid and subsisting agreement, that AmBank's interest as chargee of the land was valid and binding on GPB, that Faithmont would apply for the consent of the state authority and approval of the land board for the transfer of the land, that Faithmont pay to the liquidators of GPB RM850,000 after obtaining the necessary consent and approval and that AmBank pay to the liquidators of GPB RM650,000 after receiving the redemption sum. Yakin Teggara Sdn Bhd ('YTSB'), a contributory of GPB, one Datuk Lim a preferred creditor and certain other contributories and creditors of GBP opposed the liquidators' application on the ground that the sum of RM1.5m to be received by GPB under the proposed compromise was inadequate in view of the fact that the land was worth RM52.8m. The judicial commissioner hearing the application approved the compromise, which meant that all the orders sought by the liquidators were granted. The approval led to the parties to the consolidated suits entering a consent judgment on the agreed terms, the liquidators settling the redemption sum of RM26m with AmBank and the completion of the sale of the land to Faithmont. YTSB as a contributory and Dauk Lim as a creditor as well as certain other creditors ('the appellants') appealed to this court against the whole of the compromise order. The central issue common to all these appeals was the effect in law of a compromise to sell estate land without first obtaining the approval of the land board. It was the appellants' contention that the compromise sought by the liquidators of GPB should not have been approved by the JC because by entering into the compromise without first obtaining the approval of the land board had resulted in GPB having infringed s 214A(1) of the National Land Code ('the Land Code') and that the effect of the infringement was to render the compromise order void and unenforceable.

Held, allowing the appeals with no order as to costs:

(1) The legislative intent behind s 214A(1) of the Land Code was to prohibit the 'transfer, conveyance or disposal of' estate land without first obtaining the approval of the land board. The offences created by s 214A(1) of the Land Code were not confined to acts of transferring, conveying or disposing of estate land but in fact also included attempts to do such acts. Although no actual transfer took place at the time of the compromise, the *consensus ad idem* and the common intention between the parties was to 'transfer, to convey or to dispose of' the land without first obtaining the approval of the land board as required by s 214A(1) of the Land Code. It was clearly obvious that there was an attempt to 'transfer, to convey or to dispose of' the land without first obtaining the approval of the land board, when Faithmont had paid GPB RM5.7m towards the purchase price and had taken vacant possession of the land about a month after executing the SPA. Similarly, the compromise sought to validate an unlawful act of disposal. For a compromise under s 236 of the Act to be valid, it should be lawful. A compromise to do an

unlawful act or to validate an unlawful act was null and void. The compromise order was therefore void for illegality under s 24 of the Contracts Act 1950 (see paras 38, 40, 43–47 & 54).

(2) Due to the reliance of conflicting case law it became necessary to determine whether the approval of the land board had to be obtained first before the parties could enter into an agreement to sell estate land. After sifting through the case law it became clear that where a contract for sale of estate land was conditional upon approval by the land board, the contract was only enforceable if that condition was fulfilled. If the legislature had intended to exempt conditional agreements from the operation of s 214A(1) of the Land Code, it would have said so in clear terms. On the contrary, it provided through s 214A(10A)(a) that it was an offence to even attempt to 'transfer, to convey or to dispose of' the land without first obtaining the approval of the land board. In the circumstances, even conditional contracts of sale of land were void from the beginning if no approval from the land board had first been obtained prior to the execution of the agreement. The corollary was that the consent judgment entered into between the parties pursuant to the compromise order was void because it was an agreement by GPB to 'transfer, to convey or to dispose of' the land without first obtaining the approval of the land board, which was an offence under s 214A(10A)(a) of the Land Code and therefore a breach of s 214A(1) of the said Code (see paras 48–50, 65 & 70–72).

(3) Having regard to all the circumstances of the case and the case authorities, the argument that these appeals had become academic was rejected. The decision by AmBank and the liquidators of GPB to effect the transfer of the land to Faithmont despite the pendency of these appeals was an abuse of process and an interference with the administration of justice. An illegal agreement could not be allowed to stand and no party should benefit from such illegal agreement as a matter of public policy and principle. This court was empowered under s 69(4) of the Courts of Judicature Act 1964 to reverse the compromise order and to reinstate the position of the parties to their positions prior to the grant of the order (see paras 85–88).

[Bahasa Malaysia summary

Faithmont Estate Sdn Bhd ('Faithmont') memasuki satu perjanjian jual beli ('PJB') dengan Gula Perak Sdn Bhd ('GPB') untuk membeli tanah estet kelapa sawit GPB ('tanah tersebut') dengan balasan sebanyak RM19 juta. Faithmont juga membayar RM5.7 juta bagi harga belian. Pada masa jualan, tanah tersebut tertakluk pada sekatan dan tidak boleh dipindah milik tanpa kebenaran pihak berkuasa negeri dan kelulusan lembaga tanah estet ('lembaga tanah') dan dipajakkan pada AmBank (M) Bhd. Faithmont memfailkan guaman terhadap GPB atas kegagalannya untuk mematuhi terma PJB kerana tidak mengambil

A langkah-langkah untuk mendapatkan kebenaran pihak berkuasa negeri dan kelulusan lembaga tanah. Faithmont juga memfailkan guaman kedua terhadap AmBank sebagai pemajak tanah bagi, antara lain, penyingkiran kaveat persendirian yang dimasukkan oleh bank dalam tanah. Melalui perintah mahkamah, kedua-dua guaman yang difailkan oleh Faithmont digabungkan B dan diperintahkan untuk didengar bersama ('guaman tergabung'). Pada 1 Mac 2013, GPB digulung berikutan satu perintah mahkamah dan pelikuidasi dilantik bawah perintah penggulungan. Pada 19 Jun 2015, pelikuidasi GPB memfailkan notis usul bawah s 236(1) Akta Syarikat 1965 ('Akta'), memohon C kebenaran mahkamah untuk mengkompromi guaman tergabung untuk membenarkan GPB memasuki penghakiman persetujuan dengan Faithmont dan AmBank. Melalui skima perancangan yang dicadangkan, pelikuidasi GBP yang memohon, antara lain, perintah bahawa PJB adalah perjanjian yang sah dan kekal berkuat kuasa, bahawa kepentingan AmBank sebagai pemajak tanah D sah dan mengikat GPB, bahawa Faithmont akan memohon kebenaran pihak berkuasa negeri dan kebenaran lembaga tanah bagi pindah milik tanah, bahawa Faithmont akan membayar pelikuidasi GBP sebanyak RM850,000 selepas mendapatkan kebenaran dan kelulusan yang perlu dan bahawa AmBank membayar pelikuidasi GPB RM650,000 selepas menerima jumlah E penebusan. Yakin Tenggara Sdn Bhd ('YTSB'), seorang pencarum GPB, seorang bernama Datuk Lim, kreditor terpilih dan beberapa lagi pencarum dan kreditor GPB menentang permohonan pelikuidasi atas alasan jumlah RM1.5 juta yang bakal diterima oleh GPB bahawa kompromi yang dicadangkan tidak cukup melihat pada fakta bahawa tanah tersebut bernilai RM52.8 juta. F Pesuruhjaya kehakiman yang mendengar permohonan, membenarkan kompromi, yang bermaksud bahawa kesemua perintah yang dipohon oleh pelikuidasi dibenarkan. Kebenaran ini menyebabkan pihak-pihak guaman tergabung memasuki perintah penghakiman berdasarkan terma-terma yang disetujui, pelikuidasi-pelikuidasi menyelesaikan jumlah penebusan sebanyak G RM26 juta dengan AmBank dan penyempurnaan jualan tanah kepada Faithmont. YTSB sebagai pencarum dan Datuk Lim sebagai kreditor dan juga beberapa kreditor lain ('perayu-perayu') merayu ke mahkamah ini terhadap keseluruhan perintah kompromi. Isu utama yang timbul dalam kesemua rayuan adalah kesan undang-undang atas kompromi untuk jualan tanah estet H tanpa mendapat kebenaran lembaga tanah terlebih dahulu. Hujahan perayu-perayu bahawa kompromi yang dipohon oleh pelikuidasi GPB tidak sepatutnya dibenarkan oleh PK kerana memasuki kompromi tersebut tanpa mendapatkan kebenaran lembaga tanah terlebih dahulu menyebabkan GPB melanggar s 214A(1) Kanun Tanah Negara ('KTN') dan kesan pelanggaran I menyebabkan perintah kompromi terbatal dan tidak boleh dikuatkuasakan.

Diputuskan, membenarkan rayuan-rayuan tanpa perintah terhadap kos:

(1) Niat perundangan di dalam s 214A(1) KTN adalah melarang 'pindah milik, peralihan atau pelupusan' tanah estet tanpa mendapat kebenaran

lembaga tanah terlebih dahulu. Kesalahan-kesalahan yang dinyatakan oleh s 214A(1) KTN tidak terhad pada tindakan memindah milik, mengalih atau melupuskan tanah estet tetapi sebenarnya melibatkan percubaan melakukan tindakan-tindakan ini. Walaupun pindah milik sebenar tidak berlaku pada masa kompromi, *consensus ad idem* dan niat bersama antara pihak-pihak adalah untuk 'memindah milik, mengalih atau melupuskan' tanah tersebut tanpa terlebih dahulu mendapatkan kebenaran lembaga tanah seperti yang diperlukan oleh s 214A(1) KTN. Jelas bahawa terdapat percubaan untuk 'memindah milik, mengalih atau melupuskan' tanah tanpa terlebih dahulu mendapat kebenaran lembaga tanah ketika Faithmont membayar GPB RM5.7 juta bagi harga belian dan mengambil milikan kosong tanah sebulan selepas memasuki PJB. Begitu juga, kompromi yang dipohon untuk mengesahkan tindakan tidak sah pelupusan. Untuk menjadikan kompromi bawah s 236 Akta sah, kompromi mestilah sah bawah undang-undang. Kompromi untuk melakukan tindakan tidak sah atau mengesahkan tindakan yang tidak sah adalah tidak sah dan terbatal. Perintah kompromi, dengan itu, tidak sah di bawah s 24 Akta Kontrak 1950 (lihat perenggan 38, 40, 43–47 & 54).

(2) Akibat pergantungan kes-kes undang-undang yang bercanggah, perlu untuk memutuskan sama ada kebenaran lembaga tanah perlu diperolehi terlebih dahulu sebelum pihak-pihak boleh memasuki perjanjian untuk menjual tanah estet. Selepas menyemak kes undang-undang, jelas bahawa jika terdapat kontrak jualan tanah estet yang meletakkan syarat kebenaran oleh lembaga tanah, kontrak tersebut berkuat kuasa jika syarat ini dipenuhi. Jika badan perundangan meniatkan untuk mengecualikan perjanjian-perjanjian bersyarat daripada operasi s 214A(1) KTN, ini pasti dinyatakan dalam terma nyata. Sebaliknya, diperuntukkan melalui s 214A(10A) bahawa adalah menjadi kesalahan untuk cuba 'memindah milik, mengalihkan atau melupuskan' tanah tanpa terlebih dahulu mendapat kebenaran lembaga tanah. Dalam hal keadaan ini, kontrak jualan tanah bersyarat terbatal dari awal lagi jika kebenaran lembaga tanah tidak diperoleh terlebih dahulu sebelum termeterainya perjanjian. Kesan korolarinya adalah penghakiman persetujuan yang dimasuki pihak-pihak susulan perintah kompromi terbatal kerana sememangnya disetujui oleh GPB untuk 'memindah milik, mengalih atau melupuskan' tanah tanpa terlebih dahulu mendapat kebenaran lembaga tanah, yang mana adalah kesalahan bawah s 214A(10A) KTN dan dengan itu, melanggar s 214A(1) KTN (lihat perenggan 48–50, 65 & 70–72).

(3) Berdasarkan hal keadaan kes dan autoriti kes-kes, hujahan bahawa rayuan-rayuan ini bersifat akademik ditolak. Keputusan AmBank dan pelikuidasi GPB untuk menguatkuasakan pindah milik tanah kepada Faithmont walaupun tergantungnya rayuan-rayuan ini adalah salah guna proses dan campur tangan pentadbiran keadilan. Perjanjian tidak sah

tidak boleh dibenarkan dan atas dasar prinsip dan kepentingan awam, pihak-pihak tidak boleh menikmati perjanjian tidak sah ini. Mahkamah berbidang kuasa bawah s 69(4) Akta Mahkamah Kehakiman 1964 untuk mengakas perintah kompromi dan mengembalikan pihak-pihak kepada kedudukan asal masing-masing seperti sebelum pengeluaran perintah (lihat perenggan 85–88).]

Notes

For cases on sale and purchase, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3323–3327.

Cases referred to

Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan [2002] 2 MLJ 399, FC (refd)

Brown v Heffer (1967) 116 CLR 344, HC (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761, CA (distd)

Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, FC (refd)

Goldsmith v Sperrings Ltd [1977] 2 All ER 566; [1977] 1 WLR 478, CA (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773, FC (not folld)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637; [1999] 4 CLJ 533, CA (refd)

Malacca Malay Guru2 Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors [1971] 1 MLJ 107 (refd)

North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals [2013] 3 MLJ 617; [2013] 3 CLJ 1101, FC (distd)

Pan Electrics Sdn Bhd v ITD Vertex Consortium Sdn Bhd [2014] 1 LNS 1635, HC (refd)

Rengamah a/p Rengasamy v Tai Yoke Lai & Anor [1998] 5 MLJ 260; [1998] 1 CLJ 987, HC (not folld)

Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd [2014] 6 MLJ 341; [2014] 9 CLJ 74, CA (folld)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim & Ors [2015] MLJU 2111; [2016] 3 CLJ 84, CA (folld)

Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors [2010] 5 MLJ 437; [2012] 2 CLJ 712, CA (distd)

Legislation referred to

Closer Settlement Acts (New South Wales) [AU]
Companies Act 1965 ss 236, 236(1)(d), 237(1), 287(1)
Contracts Act 1950 s 24
Courts of Judicature Act 1964 s 69(4)
Land Acquisition Act 1960
National Land Code ss 214A, 214A(1), (10A)(a), (10A)(b), 215, Form 14A

Gopal Sri Ram (S Revenesan, David Yii and Siti Nur Amirah Aqilah bt Adzman with him) (S Ravenesan) in Civil Appeal No B-02(IM)-1995–12 of 2015 for the appellant.
Wong Rhen Yen (Jamie Wong and William Ch'ng with him) (Jamie Wong) in Civil Appeal No B-02(IM)–1996–12 of 2015 for the appelant.
Yoong Sin Min (Lau Kee Sern and Lim Pey Tsyr with her) (Shook Lin & Bok) in Civil Appeal No B-02(IM)-832–05 of 2016 for the appellant.
Unrepresented in Civil Appeal No B-02(IM)-1995–12 of 2015 for the first respondent.
Kirubakaran (Teh & Assoc) in Civil Appeal No B-02(IM)-1995–12 of 2015 for the second respondent.
Yoong Sin Min (Lau Kee Sern and Lim Pey Tsyr with her) (Shook Lin & Bok) in Civil Appeal No B-02(IM)-1995–12 of 2015 for the third respondent.
Wong Rhen Yen (Jamie Wong and William Ch'ng with him) (Jamie Wong) in Civil Appeal No B-02(IM)-1995–12 of 2015 for the fourth respondent.
Bharti Seth (Ramesh Sanghvi and K Kokilah with him) (Bharti Seth & Assoc) in Civil Appeal No B-02(IM)-1995–12 of 2015 for the fifth respondent.
Kirubakaran (Teh & Assoc) in Civil Appeal No B-02(IM)-1996–12 of 2015 for the first respondent.
Unrepresented in Civil Appeal No B-02(IM)-1996–12 of 2015 for the second respondent.
Yoong Sin Min (Lau Kee Sern and Lim Pey Tsyr with her) (Shook Lin & Bok) in Civil Appeal No B-02(IM)-1996–12 of 2015 for the third respondent.
Gopal Sri Ram (S Ravenesan, David Yii and Siti Nur Amirah Aqilah bt Adzman with him) (S Ravenesan) in Civil Appeal No B-02(IM)-1996–12 of 2015 for the fourth respondent.
Bharti Seth (Ramesh Sanghvi and K Kokilah with him) (Bharti Seth & Assoc) in Civil Appeal No B-02(IM)-1996–12 of 2015 for the fifth respondent.
Wong Rhen Yen (Jamie Wong and William Ch'ng with him) (Jamie Wong) in Civil Appeal No B-02(IM)-832–05 of 2016 for the first respondent.
Gopal Sri Ram (S Ravenesan, David Yii and Siti Nur Amirah Aqilah bt Adzman with him) (S Ravenesan) in Civil Appeal No B-02(IM)-832–05 of 2016 for the second respondent.
Unrepresented in Civil Appeal No B-02(IM)-832–05 of 2016 for the third respondent.
Kirubakaran (Teh & Assoc) in Civil Appeal No B-02(IM)-832–05 of 2016 for the fourth respondent.

Abdul Rahman Sebli JCA:

INTRODUCTION

[1] These appeals arose from the decision of the High Court at Shah Alam allowing the application by the liquidators of the second respondent, Gula Perak Bhd, for the court's approval of a compromise between three parties, namely Gula Perak Bhd, Faithmont Estate Sdn Bhd and the third respondent AmBank (M) Bhd under Kuala Lumpur High Court Originating Summons No S-24–636 of 2010 consolidated with Kuala Lumpur High Court Suit No 22NCVC-438–04 of 2012.

[2] To avoid confusion, we shall refer to the parties by their respective first names. The central issue common to all three appeals is the effect in law of a compromise to sell estate land without first obtaining the approval of the estate land board ('the land board').

THE FACTS

[3] For the purpose of determining the issue, we shall be guided by the following narration of facts. On 25 March 2010, Faithmont filed an action against Gula Perak vide Civil Suit No S-24–636 of 2010 for, inter alia, specific performance of the sale and purchase agreement dated 28 October 2005 ('the agreement') relating to an oil palm estate land (oil palm plantation) belonging to Gula Perak. We shall refer to the estate land as 'the land'.

[4] The agreement was for Gula Perak to sell the land to Faithmont for a consideration of RM19m, and Faithmont had paid RM5.7m towards the purchase price. Under cl 2.1(a) and (b) respectively of the agreement, it was Gula Perak's obligation to obtain the consent of the state authority and approval of the land board for the transfer and sale of the land.

[5] The reason why Faithmont sued Gula Perak was because Gula Perak failed to take steps to obtain the consent of the state authority and the approval of the land board for the transfer and sale of the land and further failed to comply with the terms of the agreement.

[6] On 13 April 2012, Faithmont vide Kuala Lumpur High Court Civil Suit No 22NCVC-438–04 of 2012 filed a related suit against AmBank as chargee of the land for, inter alia, the removal of a private caveat lodged by AmBank on the land. AmBank was Gula Perak's only secured creditor, and is claiming that it is entitled to all the sale proceeds of the land to the exclusion of all unsecured creditors and contributories of Gula Perak.

[7] Gula Perak was wound up on 1 March 2013 by RHB Bank vide Shah Alam High Court Winding-Up No MT FLJC 28–81 of 2011 with one Ooi Wan Chee and one Ong Hock Ann appointed as the liquidators.

[8] On 19 November 2013, Gula Perak filed its defence to Faithmont's claim and pleaded that Faithmont breached the terms of the agreement and counterclaimed, inter alia, for damages for loss of profit and loss of use of the land from the date vacant possession was given to Faithmont on 16 November 2005.

[9] On 19 May 2014, pursuant to a court order, the two suits filed by Faithmont against Gula Perak and AmBank were consolidated and were ordered by the learned High Court judge to be heard together by way of a full trial. We shall refer to the two suits as 'the consolidated suits'. During the course of the trial, Faithmont produced a valuation report dated 29 November 2010 issued by Raine & Horne International Zaki & Partners Sdn Bhd which confirmed that the market value of the land was RM52.8m.

THE APPLICATION FOR COMPROMISE

[10] On 19 June 2015, the liquidators of Gula Perak filed a notice of motion seeking approval from the Shah Alam winding up court to compromise the consolidated suits to enable Gula Perak to enter into a consent judgment with Faithmont and AmBank. The application was made under s 236(1)(d) of the Companies Act 1965 ('the Companies Act'), which provides:

> 236(1) The Liquidator may with the authority either of the Court or of the Committee of Inspection —
>
> ...
>
> (d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

[11] By the terms of the provision, it is clear that the compromise could either be with the authority of the court or the committee of inspection. In this case, the liquidators chose the court for such authorisation, and we see nothing wrong with that. The fact that the creditors had requested for the formation of a committee of inspection as pointed by Yakin Tenggara does not take away the power of the court to approve the compromise.

[12] It was argued that the failure by the liquidators to seek approval from the committee of inspection before making any arrangement with Faithmont and AmBank to compromise the consolidated suits shows that the application for compromise was not bona fide.

[13] We were referred to s 237(1) of the Companies Act which according to Yakin Tenggara required the liquidators to form the committee of inspection to consider the objection raised by the contributories and creditors of Gula Perak to the proposed scheme of compromise. The provision reads:

> (1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meetings or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.

[14] We see nothing in the provision that can be construed as requiring the liquidator to form the committee of inspection as contended by Yakin Tenggara. The provision merely requires a liquidator to have regard to any direction given by the resolution of the creditors or contributories at any general meeting, or by the committee of inspection in the administration of the assets of the company and in the distribution thereof among its creditors.

[15] With due respect, Yakin Tenggara's reliance on the Federal Court case of *North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals* [2013] 3 MLJ 617; [2013] 3 CLJ 1101 and the decision of this court in *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761 is misconceived as the liquidators in those cases were legally obliged to constitute the committee of inspection by order of the court.

[16] In any event, the liquidators have explained that Gula Perak had no sufficient fund to call for the contributories and creditors meeting. Section 287(1) of the Companies Act provides that a liquidator shall not be liable to incur any expense in relation to the winding up of a company unless there is sufficient available assets.

ISSUE OF LEGAL OPINION

[17] Yakin Tenggara further argued that the liquidators of Gula Perak ought to but failed to obtain any legal opinion before entering into the compromise. It was contended that as the scheme of compromise was meant to benefit the contributories and creditors of Gula Perak, the liquidators should have given legal opinion to the contributories and creditors that the meagre sum of RM1.5m was the appropriate sum to be received by Gula Perak against the

value of the land, which was RM52.8m.

[18] In support of the argument, reference was made to the judgment of the High Court in *Pan Electrics Sdn Bhd v ITD Vertex Consortium Sdn Bhd* [2014] 1 LNS 1635, where the following passage, amongst others, in *McPherson's Law of Company Liquidation* (3rd Ed), Sweet & Maxwell was quoted with approval by Hanipah Farikullah J:

> When deciding whether or not to grant approval the court will usually rely on the liquidator's commercial judgment. In considering the settlement of legal proceedings liquidators are expected to obtain advice from legal practitioners appropriate to the nature and value of the claims. Where large sums are involved courts expect liquidators to secure the advice of an experienced counsel; someone with at least seven years' post-admission experience.

[19] The liquidators' answer to the argument is that they have in their affidavit affirmed on 10 August 2015 stated in para 9(a) as follows:

> I have obtained legal advice on the prospects of Faithmont's Civil Suit for specific performance vis-a-vis, the termination of the SPA and have been advised the GPB has a weak defence to Faithmont's Civil Suit, especially after having heard the evidence of Tan Sri Cheng Pow and Mr Harvindar Singh who testified in Faithmont's Civil Suit. It is therefore in the Respondent's interests to compromise and not incur further Court's time and effort to defend Faithmont's Civil Suit.

[20] The evidence is also undisputed that before entering into the compromise, the liquidators had secured the legal advice of their present counsel, Dato' K Kirubakaran who has almost 35 years experience in the legal practice. In the circumstances, the question of failure to obtain legal advice as alleged by Yakin Tenggara does not arise.

REASON FOR AND TERMS OF COMPROMISE

[21] The reason why the liquidators found the compromise to be necessary was because Gula Perak was hopelessly insolvent with an estimated deficiency of RM149,432,574.28. Among the orders sought by the liquidators in the notice of motion were the following:

(a) that the agreement dated 28 October 2005 was a valid and subsisting agreement;

(b) that AmBank's interest as chargee of the land was valid, subsisting and binding on Gula Perak;

(c) that Faithmont was to apply for the land board approval and state consent for the transfer of the land;

(d) that the redemption sum for the land was agreed at RM26m;

(e) that Faithmont was to pay RM850,000 to the liquidators of Gula Perak after Faithmont had obtained the state consent and the land board approval;

(f) that AmBank was to pay RM650,000 to the liquidators of Gula Perak after receipt of the redemption sum; and

(g) that Gula Perak within seven working days from the date of the consent order was to execute a valid and registrable memorandum of transfer in Form 14A under s 215 of the National Land Code ('the Land Code') in respect of the land in favour of Faithmont.

[22] Of particular relevance to the present appeals is para (a), which is a prayer for validation of the agreement dated 28 October 2005 and para (c), a prayer for an order that Faithmont was to apply for the state consent and the land board approval for the transfer and sale of the land. We shall come back to the matter shortly.

[23] By the terms of the proposed compromise, the sum that Gula Perak would be receiving from the sale of the land to Faithmont was RM1.5m, made up of RM850,000 to be paid by Faithmont and RM650,000 to be paid by AmBank.

OPPOSITION TO THE COMPROMISE

[24] Yakin Tenggara, as one of the contributories of Gula Perak, opposed the notice of motion on the ground that the sum of RM1.5m to be received by Gula Perak under the proposed compromise was inadequate in view of the fact that the land is worth RM52.8m.

[25] It was argued that the liquidators should not have agreed to the compromise as the small consideration of RM1.5m does not and will not benefit Gula Perak and its contributories and creditors. According to Yakin Tenggara, the land could be sold at a higher price than a mere RM19m.

[26] As for Datuk Lim (the appellant in Appeal No B-02(IM)-1996–12 of 2015), his opposition to the compromise was because according to him it served to solely favour the rights of Faithmont and AmBank, for the following reasons:

(a) Faithmont would then be able to purchase the land at two times below the market value, which will not be commercially beneficial to Gula Perak who would stand to lose from such undervalued sale of the land;

(b) AmBank only wanted to recoup its losses as quickly as possible despite selling the land two times below the market price, which is gravely prejudicial to Gula Perak; and

(c) the sale of the land at two times below the market price is gravely prejudicial to the other creditors and contributories of Gula Perak because they would then stand a lower chance of receiving any proceeds from any future liquidation of Gula Perak's assets as such proceeds would have to be paid to AmBank to settle the remaining indebtedness, which will be higher due to the undervalued sale of the land.

APPROVAL OF THE COMPROMISE

[27] On 4 November 2015, the learned judicial commissioner ('JC') approved the compromise. The approval means that all the orders sought by the liquidators were granted, including an order that the agreement executed by Gula Perak on 28 October 2005 to sell the land to Faithmont without first obtaining the approval of the land board was a valid and subsisting agreement.

[28] The approval also gave the liquidators the green light to enter into an agreement to transfer the land to Faithmont, subject to an express requirement that Faithmont was to apply for the land board approval and the state consent for the transfer of the land. This term of the compromise was in fact a replication of cl 2.1(a) and (b) of the agreement dated 28 October 2005 except that this time around it was the purchaser instead of the vendor who was to make the application for approval. We shall refer to this court order as 'the compromise order'.

[29] One week after the compromise order was obtained, ie on 11 November 2015, parties to the consolidated suits entered into a consent judgment on the agreed terms, on which date itself RM2.6m was paid by the liquidators of Gula Perak to AmBank's solicitors, being 10% of the redemption sum of RM26m. The balance sum of RM23.4m was paid on 23 March 2016.

[30] On 3 December 2015, Yakin Tenggara as a contributory of Gula Perak and Datuk Lim as a preferred creditor in the sum of RM150,000 and as unsecured creditor in the sum of RM28.2m appealed to this court against the whole of the compromise order.

FAIT ACCOMPLI

[31] On 21 March 2016, which is approximately 11 years seven months after the agreement was executed on 28 October 2005 and about four month after the compromise was approved on 4 November 2015, the land board approval for the sale of the land was obtained. The sale was completed on 23

March 2016 upon full payment of the redemption sum of RM26m to AmBank. The land is now registered in the name of Faithmont — a *fait accompli* which rendered these appeals academic, so say Faithmont, AmBank and the liquidators of Gula Perak.

[32] On 25 March 2016 Datuk Lim obtained a stay of the compromise order and on 6 April 2016 this court allowed Faithmont's application to intervene in these appeals, having satisfied the test for allowing a party to intervene. AmBank's appeal in these proceedings is against the decision of another High Court judge allowing stay of the compromise order. As at the date of its winding up on 1 March 2013, Gula Perak was indebted to AmBank in the total sum of RM81,037,450.62.

THE ARGUMENTS

[33] The main plank of Yakin Tenggara's argument, which Datuk Lim adopted, is premised on s 214A(1) of the Land Code which provides as follows:

> 214A Control of transfer of estate land.
>
> (1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereafter referred to as 'the Board') established under sub-section (3).

[34] The contention is that the compromise sought by the liquidators of Gula Perak should not have been approved by the learned JC because by entering into the compromise without first obtaining the approval of the land board, Gula Perak had infringed s 214A(1) of the Land Code. The effect of the infringement according to Datuk Seri Gopal Sri Ram for Yakin Tenggara is to render the compromise order void and unenforceable.

[35] Dato' K Kirubakaran for the liquidators and Ms Yoong Sin Min for AmBank, however, gave a different construction to s 214A(1). The proposition advocated by both counsel is that what s 214A(1) prohibits is not 'agreement' but 'transfer'.

[36] What the proposition amounts to is this. Since the compromise did not involve 'transfer' but only 'agreement' to transfer, there was no requirement for prior approval of the land board and as such the compromise did not breach s 214A(1) of the Land Code. The nub of the argument is that the prohibition under s 214A(1) only kicks in after 'transfer' had taken place and not before.

[37] The learned JC acceded to the argument and this is what she said in her

judgment:

> In desperation to salvage an otherwise untenable case, Yakin contended that the compromise is an illegal compromise simply because the parties to the compromise have yet to obtain the estate land board's approval under s 214A(10A) of the National Land Code. Let this court be clear from this juncture that this section only stipulates that a transfer of estate land requires the estate land board's approval and a transfer without such approval shall render the transfer invalid and parties involved in the transfer shall be liable to an offence. *The section does not mention of any agreements to transfer estate land, but specifically the act of transferring the estate land. This is the distinction that Yakin had unfortunately failed to understand*. (Emphasis added.)

THE LEGISLATIVE INTENT

[38] The legislative intent behind s 214A(1) of the Land Code is clear, that it prohibits the transfer, conveyance or disposal of estate land 'in any manner whatsoever' without first obtaining the approval of the land board. It is an offence to do so and this is provided by s 214A(10A)(a) which states:

> (10A)(a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of subsection (1), shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not les than one year and not more than three years and to a fine not exceeding ten thousand ringgit.

[39] As can be seen, there are three separate and distinct offences (and not just 'transfer') created by s 214A(10A)(a) for contravening s 214A(1) and they are:

(a) to transfer any estate land in any manner whatsoever;

(b) to convey any estate land in any manner whatsoever; and

(c) to dispose of any estate land in any manner whatsoever.

[40] The offences it will be noted are not confined to acts of transferring, conveying, or disposal of estate land. They include attempts to do such acts, and going by the punishment provided for the offences upon conviction, which is imprisonment for a term of not less than one year and not more than three years and a fine not exceeding ten thousand Ringgit (as it presently provides), they cannot by any reckoning be treated as trivial offences. A breach of s 214A(1) of the Land Code is therefore a crime that is not to be taken lightly.

[41] It is undisputed that by the time the application for compromise was filed on 19 June 2015, which was almost ten years after the agreement was signed on 28 October 2005, the approval by the land board for the transfer of

the land had yet to be obtained. That explains why the liquidators sought the court's approval for validation of the agreement and for a 'fresh' condition that Faithmont (instead of Gula Perak) was to apply for approval from the land board for the sale of the land.

ATTEMPT TO COMMIT OFFENCE

[42] Assuming for a moment that Gula Perak and AmBank are right in their contention that the 'agreement' to transfer, not being a 'transfer' did not require prior approval of the land board and therefore not prohibited by s 214A(1), the question one has to ask is whether such agreement was an attempt by Gula Perak to 'transfer', to 'convey' or to 'dispose of' the land 'in any manner whatsoever' within the meaning of s 214A(1).

[43] We would think so. Although no actual 'transfer' took place at the time of the compromise, in the sense that the land was not registered in the name of Faithmont, the simple truth is that the *consensus ad idem* and the common intention between the parties was to 'transfer', to 'convey' or to 'dispose of' the land without first obtaining the approval of the land board as required by s 214A(1) of the Land Code.

[44] There is no mistaking their intention that the approval from the land board was only to be obtained later, ie after the compromise had been approved by the court, but by the time the compromise was approved on 4 November 2015, ten years had passed since the agreement was executed on 28 October 2005. That is a very long delay by any measure of time.

[45] Clearly this was an attempt to 'transfer, convey or dispose of' estate land without first obtaining the approval of the land board, an offence under s 214A(10A)(a) of the Land Code. The attempt is obvious as RM5.7m had been paid towards the purchase price, and Faithmont had taken vacant possession of the land on 16 November 2005, barely one month after executing the agreement on 28 October 2005.

[46] For all intents and purposes, the land had been 'disposed of' to Faithmont since 16 November 2005 without the approval of the land board. What the compromise sought to achieve was to validate that unlawful act of disposal. Like the execution of the agreement on 28 October 2005, the compromise was yet another attempt by Gula Perak to circumvent the strict requirement of prior approval under s 214A(1) of the Land Code.

[47] For a compromise under s 236 of the Companies Act to be valid, it must be lawful. A compromise to do an unlawful act or to validate an unlawful act is null and void and has no effect whatsoever and we can say without fear of

contradiction that neither the court nor the committee of inspection nor any other authority for that matter can legalise an otherwise illegal act. The compromise order is therefore void for illegality under s 24 of the Contracts Act 1950.

CASE LAW

[48] As for case law on s 214A(1) of the Land Code, we were referred to two conflicting decisions of two different panels of this court which dealt with the issue. The first is *Vellasamy a/l Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN 35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437; [2012] 2 CLJ 712 ('Vellasamy') which decided by majority that s 214A(1) does not prohibit the making of a contractual agreement of sale.

[49] The second case is *Tai Thong Flower Nursery Sdn Bhd v Master Pyrodor Sdn Bhd* [2014] 6 MLJ 341; [2014] 9 CLJ 74 ('Tai Thong') which unanimously decided that the moment an agreement to transfer estate land is executed without the approval of the land board, it becomes proof that the transfer contravenes s 214A(1).

[50] We shall deal with *Tai Thong* first. In holding that the execution of the agreement was void for contravention of s 214A(1), Zaharah Ibrahim JCA (now FCJ) delivering the judgment of the court held at p 352 (MLJ); p 88 (CLJ):

> The requirement that the approval of the estate land board must be obtained before the execution of any agreement for the transfer, conveyance or disposal of estate land or any portion of it was reinforced by the provisions contained in para 214A(10A)(b). The moment an agreement is executed without the approval of the estate land board for the transfer, conveyance or disposal of estate land, such execution became conclusive proof that the transfer, conveyance or disposal was being done in contravention of the clear prohibition in sub-s 214A(1).
>
> While s 214A of the NLC did not itself provide an agreement to transfer, convey or dispose of estate land without the approval of the estate land board was void, the fact that such transfer, conveyance or disposal was prohibited by sub-s 214A(1), and the act of transferring, conveying or disposing constituted an offence under sub-s 214A(10A)(a), meant that any contract for such transfer, conveyance or disposal, and consequently any memorandum of transfer pursuant to such contract, was liable to be struck down as being void for illegality under s 24 of the Contracts Act 1950.

[51] Section 214A(10A)(b) referred to in the first of the two paragraphs above is couched in the following language:

> 214(10A)(b) For the purpose of this section, the execution of an agreement to

convey or dispose of the whole of an estate land to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board shall be conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1); and any act to demarcate an estate land or to cause or permit the demarcation of an estate land otherwise than in accordance with the provisions of this Act shall be *prima facie* proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of subsection (1).

[52] The effect of the provision is to relieve the party wishing to prove breach of s 214A(1) of the burden of adducing prima facie evidence of such breach. Proof of execution of the agreement is sufficient. If Yakin Tenggara's reliance on this part of the judgment is to contend that the execution of the agreement on 28 October 2005 and the consent judgment entered into on 11 November 2015 pursuant to the compromise order provide proof that Gula Perak had infringed s 214A(1), then we must say that the reliance is misplaced.

[53] Section 214A(10A)(b) only applies where the conveyance or disposal of estate land is to two or more persons (where it involves the whole of the estate land), and to one or more persons (where it involves any portion or portions of the estate land). But that is not the factual matrix of the case before us, which was an agreement to transfer the whole of the estate land to only one party, ie to Faithmont. This takes the case outside the scope of s 214A(10A)(b). Yakin Tenggara cannot therefore rely on the execution of the agreement as prima facie proof that s 214A(1) had been infringed.

[54] Be that as it may, this is not a password for Gula Perak to get out of jail as its attempt to transfer the land to Faithmont, firstly through the agreement and subsequently through the compromise without first obtaining the approval of the land board is still an offence under s 214(10A)(a), the effect of which is to render both the agreement and the compromise unlawful. In law, unless the statute expressly so provide, there is no time bar for the prosecution of a criminal offence, even where the contravention has been rectified.

[55] As for this court's decision in *Vellasamy* which endorsed the decision of the High Court in *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor* [1998] 5 MLJ 260; [1998] 1 CLJ 987 ('Rengamah'), this is what Abdul Malik Ishak JCA delivering the judgment of the majority said in dealing with s 214A(1) of the Land Code:

> Both *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399 (FC) and *Rengamah a/p Rangasamy v Tai Yoke Lai & Anor* [1998] 5 MLJ 260 (HC) sided the plaintiffs and these two cases laid down a singular principle of law and that would be this. That s 214A of the NLC *is not a bar to agreements for the*

sale of land but rather it is only a bar to the registration of the transfer pursuant to the agreement.

Section 214A(4) of the NLC clearly provides that the owner of estate land must make the application for approval to the estate land board jointly with the intended purchaser. There is no need to obtain approval first before entering into any form of agreement with the intended purchaser. The agreement in this case accorded with the language and spirit of s 214A(1) of the NLC as it provides that there can be no transfer of the land without approval of the estate land board having first been obtained. The agreement, being a conditional agreement, was therefore not illegal, and could not be declared null and void. It would only become null and void if the estate land board refused approval of the sale of the land, which was not the issue before the court (per Augustine Paul JC (now FCJ) in *Rengamah a/p Rengasamy v Tai Yoke Lai & Anor)*. (Emphasis added.)

[56] Learned counsel for AmBank informed us that the decision has been affirmed by the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 ('Gurbachan Singh').

[57] We have read *Gurbachan Singh* and we must say with due respect to learned counsel that it is not entirely correct to suggest that the majority view in *Vellasamy* on s 214A(1) of the Land Code has been affirmed by the Federal Court. Nowhere in the judgment did the Federal Court deal with, let alone decide on the issue of whether approval from the land board must first be obtained before the parties can enter into an agreement to sell estate land.

[58] The Federal Court decision must be understood in the context of the questions of law posed for determination. There were five questions posed for the Federal Court's determination in that case and they were the following:

Question 1: Whether the existence of, and scope of duties in, a solicitor-client relationship is to be determined only by reference to the retainer;

Question 2: Whether a fiduciary is entitled to restitution of expenditure incurred in securing a benefit subsequently determined to be due and payable to the persons whom the fiduciary owes duties;

Question 3: Whether a Court is entitled to lift the corporate veil of a company in order to do justice despite it not being the pleaded or argued case of the claimants that the company concerned was used as an engine of fraud;

Question 4: Whether a trust could be imposed to allow the Respondents to acquire equitable interests in the land prior to receivership when the Respondents acknowledge that their claim is limited to only a portion of the total 3681 acres of undivided interest in the land; and

Question 5: Whether claimed beneficial interest in fragmented portions of Estate

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> Land contingent upon obtaining approval from the estate land board under Section 214A of the National Land Code 1965 and/or the consent of transfer from the Menteri Besar entitles the Court to declare beneficial interest for the purpose of an immediate equitable remedy.

B

[59] Of the five questions, it is Question 5 if at all, that is of relevance to the issue before us. But the fact is, the Federal Court declined to answer Question 5 along with Question 4, as it found it unnecessary to do so. We reproduce below what Richard Malanjum CJ (Sabah and Sarawak) delivering the unanimous decision of the court said at p 759:

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> In view of the findings we arrived at for Questions 1,2 and 3, we are of the opinion that we need not answer Questions 4 and 5. As we have said above, Questions 1 and 2 may be determined on their own merits. They are not dependent on the determination of Questions 3 to 5. We therefore decline to answer Questions 4 and 5.

D

[60] Thus, although the Federal Court affirmed *Vellasamy*, it was not affirmation of the majority view that s 214A(1) of the Land Code is not a bar to agreements for sale of estate land without first obtaining the approval of the

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land board. The majority decision in *Vellasamy* was affirmed on entirely different grounds. *Gurbachan Singh* is therefore not authority for the proposition advocated by AmBank and the liquidators.

F

[61] As for the Federal Court case of *Batu Kawan Bhd v Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 2 MLJ 399 relied on by the majority in *Vellasamy,* again we do not think, with the greatest of respect, that the decision is authority for saying that an agreement to sell estate land without the prior approval of the land board is not prohibited by s 214A(1) of the Land Code.

G

[62] The issue before the Federal Court in that case was whether the restriction imposed by s 214A(1) was relevant in assessing the market value of estate land which was the subject of compulsory acquisition under the Land Acquisition Act 1960, which the Federal Court decided that it was. The issue

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has nothing to do with the issue before us in these appeals. Therefore the ratio decidendi of the case is likewise irrelevant.

[63] As we mentioned earlier, this court in *Vellasamy* endorsed the decision of the High Court in *Rengamah.* As a matter of fact the panel relied heavily on

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that decision. One of the issues for the court's determination in *Rengamah* was whether the agreement to sell estate land was an 'instrument of transfer' within the meaning of s 214A(1) of the Land Code. This is how Augustine Paul JC (as he then was) dealt with the issue:

> Thus, the case of the agreement, cl 3 and the addendum make it clear that the

formation of a binding contract of sale of the said land depends on obtaining the required approval of the estate land board. The agreement would be rendered null and void if the approval is not obtained. *It will become enforceable only upon fulfillment of the condition stipulated therein. Until that condition is fulfilled, the essential and main obligation of the parties, ie the obligation of the plaintiff to sell and the obligation of the defendants to purchase, remain inchoate* (see *Chi Liung Holdings Sdn Bhd v Attorney General* [1994] 2 SLR 354). (Emphasis added.)

[64] The learned JC then went on to apply *Brown v Heffer* (1967) 116 CLR 344, a case on testamentary will under the Closer Settlement Acts of New South Wales, after which he made the following observations:

It must further be observed that the receipt of a part of the purchase price by the plaintiff under the agreement does not alter the status of the parties nor the character of the agreement (see *McWilliam v McWilliam Wines Pty Ltd* (1964) 114 CLR 656). The agreement therefore accords with the language and spirit of s 214A(1) of the NLC as it provides that there can be no transfer of the said land without the approval of the estate land board having first been obtained. *The corollary is that the agreement does not amount to an instrument to transfer estate land within the meaning of s 214A(1) of the NLC*. (Emphasis added.)

[65] What we can gather from the above pronouncements by Augustine Paul JC is that where a contract for the sale of estate land is conditional upon approval by the land board, the contract is only enforceable if that condition is fulfilled, because until that condition is fulfilled, the obligations of the parties remain inchoate, meaning to say the parties' obligations under the agreement are put on hold pending approval by the land board.

CONTINGENT CONTRACTS

[66] In an ordinary conditional or contingent contract, a term in the agreement that requires a party to perform a certain act is valid and binding on that party and is enforceable at the instance of the other party unless the act is illegal or impossible of performance. That perhaps was the reason why Faithmont sued Gula Perak for specific performance to compel Gula Perak to obtain the requisite approval from the land board. It was on the premise that the agreement was valid and enforceable.

[67] But that is the scenario in an ordinary contingent contract. In the context of contingent contracts involving estate land, we are inclined to think that it will be against the spirit and policy consideration behind s 214A(1) of the Land Code to allow estate landowners to execute sale and purchase agreements without first obtaining the approval of the land board.

[68] If Parliament has expressed a clear intention to prohibit transfer,

conveyance or disposal of estate land 'in any manner whatsoever' without the prior approval of the land board on pain of criminal prosecution, it stands to reason that an agreement to 'transfer, convey or dispose of' estate land without first obtaining the approval of the land board will likewise be against the spirit and policy consideration behind s 214A(1) of the Land Code.

INSTRUMENT OF DISPOSAL

[69] Even if it is true that a sale and purchase agreement is not an 'instrument of transfer' as decided by Augustine Paul JC in *Rengasamy,* it clearly is an instrument to dispose of estate land within the meaning of s 214A(1) of the Land Code. To our mind this is the kind of mischief that s 214A(1) is designed to strike down.

[70] If the Legislature had intended to exempt conditional agreements from the operation of s 214A(1), it would have said so in clear terms. There is none in the whole of s 214A. On the contrary, it provides through s 214A(10A)(a) that it is an offence to even attempt to 'transfer, convey or dispose of any manner whatsoever any estate land in contravention of section (1)'.

[71] We are therefore unable to agree with *Rengasamy* that a conditional contract to sell estate land would only become void if the land board refuses approval of the sale. In our view such contract of sale is void from the beginning if no approval from the land board had first been obtained prior to the execution of the agreement.

[72] The corollary is that the consent judgment entered into between the parties on 11 November 2015 pursuant to the compromise order is void, not because Gula Perak breached any term of the compromise order but because it was an agreement by Gula Perak to 'transfer, convey or dispose of' estate land without first obtaining the approval of the land board, which as we said is an offence under s 214A(10A)(a) of the Land Code and therefore a breach of s 214A(1).

[73] It is irrelevant that Datuk Lim had on 28 October 2005 as a director of Gula Perak signed a directors circular resolution approving the sale of the land on the terms and conditions as stated in the agreement. It is also irrelevant that the settlement sum of RM26m offered by Faithmont under the compromise for the redemption of AmBank's charge over the land is much higher than the contractual sum of RM19m under the agreement.

[74] Nor is it relevant that the sale price of RM19m will not be enough to settle Gula Perak's debt to AmBank. All these are irrelevant to the issue of whether the compromise, being an attempt to transfer estate land without first

obtaining the approval of the land board, is unlawful for contravening s 214A(1) of the Land Code.

[75] It is pertinent to note that this issue was not discussed in *Rengamah.* In fairness to the learned JC it was not an issue before the court. Therefore we do not see how *Rengamah,* and by necessary implication *Vellasamy* which endorsed it, can be of assistance to Faithmont, Gula Perak and AmBank.

VELLASAMY V THAI THONG

[76] The learned JC in the present case chose to follow *Vellasamy* and not *Tai Thong*, and there is nothing wrong with that of course: see the Federal Court decision in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 where Peh Swee Chin FCJ delivering the judgment of the court said at p 13:

> In this connection it is interesting to refer to *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801; [1972] AC 1027 at p 1054. It was held that courts in the tiers below the Court of Appeal cannot rely on the per incuriam rule applied by the Court of Appeal itself, but may choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.

[77] Having regard to the view that we take on s 214A(1) of the Land Code, we do not find it necessary to comment on the reasons given by the learned JC for allowing the liquidators' application under s 236 of the Companies Act, save to say that we are in agreement with the following pronouncement in *Tai Thong*:

> The presence of the words 'desiring to transfer, convey or dispose of in any manner whatsoever such land' and the words 'to whom the land is to be transferred, conveyed or disposed of' (emphasis added) in sub-s 214A(4) clearly meant that the obtaining of the approval must be done before the execution of the agreement by which the land would be conveyed or disposed of.

INTERFERENCE WITH ADMINISTRATION OF JUSTICE

[78] There is one last matter that we need to deal with before we pronounce our judgment. It was brought to our attention by Yakin Tenggara that subsequent to the filing of these appeals, AmBank and the liquidators of Gula Perak had executed the sale and purchase of the land and had further effected transfer of title to Faithmont.

[79] It was submitted that this tantamounts to an abuse of the court process and an interference with the administration of justice in that it was an attempt to dispose of the subject matter of the appeals as quickly as possible to render it difficult for Yakin Tenggara to maintain its appeal.

[80] AmBank's curt answer to the complaint is that having regard to the current status of the land, the alleged breach of s 214A(10A)(a) of the Land Code is a non-issue and should be rejected accordingly.

[81] Our first impression with regard to AmBank's response to the complaint is that it fortifies the view that the land board's approval is required where the parties are desirous of entering into a contract to 'transfer, convey or dispose of in any manner whatsoever' any estate land. Such desire is manifested in the compromise itself and the final act of registering the land in the purchaser's name is but a mere formality to give effect to that desire.

[82] The case of *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637; [1999] 4 CLJ 533, CA provides a useful guideline as to how the court should deal this type of situation. The following passage at pp 645–646 (MLJ); p 541 (CLJ) of the judgment is relevant:

> Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

[83] The learned judge went on to cite with approval the following pronouncement by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566; [1977] 1 WLR 478 at p 489:

> In a civilized society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

[84] In *Malacca Malay Guru2 Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors* [1971] 1 MLJ 107 Sharma J in dealing with the issue of restitution decided as follows at p 109:

> The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. (See *Jai Berhm v Kedar Nath Marwari* 49 IA 351; AIR 1922 PC 269, *Prayag Narain v Kamekhea* 36 IA 97). In *Lala Bhagwan Das v Lala Kishen Das* [1953] SCR 559 the Supreme Court of India put the matter thus:

> On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.
>
> The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this the Court may make any order including an order for the refund of costs of the payment of interest, damages, compensation or mesne profits as may properly be consequential on such variation or reversal of the order.

[85] Having regard to all the circumstances of the case and on the authorities that we have just referred to, we reject the argument that these appeals have become academic. It is clear to us that the decision by AmBank and the liquidators of Gula Perak to effect transfer of the land to Faithmont despite the pendency of these appeals is an abuse of process and an interference with the administration of justice. When faced with this kind of abuse, we cannot, as Lord Denning once said in a different context, wring our fingers and say 'there is nothing we can do about it'. Justice demands that we do something about it.

[86] The approval by the land board for the transfer of the land to Faithmont after the compromise order was obtained does not and cannot alter the fact that the compromise infringed s 214A(1) of the Land Code. An illegal agreement cannot be allowed to stand and no party should benefit from such illegal agreement as a matter of public policy and principle.

[87] Section 69(4) of the Courts of Judicature Act 1964 empowers this court to do any of the following:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

[88] We agree with Yakin Tenggara that based on the illegal act of the liquidators of Gula Perak, Faithmont and AmBank in entering into the scheme of compromise without first obtaining the approval of the land board, this court is empowered to reverse the compromise order and to reinstate the position of the parties to their positions prior to the grant of the order.

[89] For this proposition, we rely on the decision of this court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim & Ors* [2015] MLJU 2111; [2016] 3 CLJ 84 where Abdul Aziz Abdul Rahim JCA delivering the unanimous decision of the court, inter alia, said at p 104:

The next issue to be considered is what would be the consequences in a situation like ours wherein the appeal was allowed and the judgment of the High Court for RM35,087,135.06 was set aside. In our view, the principle is when a judgment is set aside then the court must put right the position of parties by ordering restitution. The status quo of parties must be restored to the position prior to the impugned judgment being granted. In other words, the court is seised with inherent jurisdiction to restore parties to status quo ante.

OUR DECISION ON THE APPEALS

[90] For all the reasons aforesaid, we allow Yakin Tenggara's and Datuk Lim's appeals and set aside the decision of the learned JC, and our decision is unanimous. AmBank's appeal against the grant of a stay of the compromise order is struck out on learned counsel's application, which has just been made.

[91] Since we have allowed Yakin Tenggara's and Datuk Lim's appeals, and set aside the decision of the High Court approving the compromise, we do not see any other outcome of this decision except that the positions of the parties are to be restored to the positions they were in prior to the compromise order, and we so order. There shall be no order as to costs.

Appeals allowed with no order as to costs.

Reported by Kohila Nesan